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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 428

EL DORADO OIL WORKS and EL DORADO TERMINAL COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION CORPORATION, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

Brief for General American Transportation Corporation, Appellee, on Reargument

INTRODUCTORY

This brief is presented in behalf of appellee, General American Transportation Corporation (intervening defendant in the United States District Court), successor in interest to General American Tank Car Corporation, defendant in the suit in the United States District Court out of which the instant cause has arisen. For convenience, each of these two corporations will be hereinafter referred to without distinction as the "Car Corporation". Similarly, the appellants herein, El Dorado Oil Works

and El Dorado Terminal Company, will be referred to without distinction as the "Oil Works".

The United States District Court, specially constituted of three judges under the Urgent Deficiencies Act (38 Stat. 219; 28 U.S.C., Secs. 41(28) and 43-48, inclusive) concluded that that court was without jurisdiction of this suit and for that reason the suit should be dismissed (R. 33-40). The Court said: "We do not pass upon the merits of the cause * * *" (R. 35). By the final decree the relief prayed for was denied and the complaint was dismissed "for want of jurisdiction" (R. 40-47).

Subsequently to the prior argument in this cause, this Court entered an order dated February 11, 1946, as follows:

> "Restored to the summary docket for further argument on the merits on the assumption that the District Court has jurisdiction."

This brief will therefore be addressed to the merits only. In some measure it will comprehend the presentation in the prior brief for this appellee, dated January 23, 1946, it being understood that the briefs currently to be filed will supersede those heretofore submitted.

OPINIONS BELOW

The opinion of the specially constituted District Court (R. 33) is reported in 59 F. Supp. 738.

The report of the Interstate Commerce Commission is reported in 258 I.C.C. 371.

JURISDICTION

The decree of the District Court was entered April 9, 1945 (R. 40). The petition for appeal filed June 1, 1945, was allowed the same day (R. 41). Probable jurisdiction was noted October 15, 1945. The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (U.S.C., Title 28, Sec. 47), and Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U.S.C., Title 28, Sec. 345).

QUESTIONS PRESENTED

Whether the Interstate Commerce Commission heard and determined the question, held by this Court to be administrative in character, and entrusted to the Commission for determination.

As subordinate questions,

(a) whether a full and adequate hearing was afforded;

(b) whether the Commission's findings and conclusions are supported by evidence;

(c) whether the Commission usurped the province of the District Court.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in the Appendix.

STATEMENT OF THE CASE

This cause had its origin in a suit at law brought by the Oil Works, lessee of certain railroad tank cars from the Car Corporation, the owner and lessor of such cars, to recover from the Car Corporation certain moneys, hereinafter styled "car mileage", received by the Car Corporation from the rail carriers as compensation for the use of the cars in the transportation of property of the Oil Works in interstate commerce. The moneys sought to be recovered by the Oil Works constitute the excess of the car mileage, so received by the Car Corporation from the rail carriers, above the amount of the car rental payable by the Oil Works for the leased cars. Under the terms of a so-called lease agreement (September 28, 1933) (R. 52) the Car Corporation agreed, for a term of three years commencing on January 1, 1934, to furnish tank cars to the Oil Works for the shipment of the latter's products at a specified monthly rental for each car. It was provided that fifty cars, styled "Permanent Cars", should be so furnished at a rental of $27.50 per car per month, and that such additional cars as the Oil Works might require would be furnished at a rental of $30 per car per month. It was further provided that the Car Corporation would collect from the rail carriers over whose lines of railway such cars would pass the car mileage payments made by the rail carriers as compensation for the use of such cars in railroad service and would credit the payments so collected to the car rental or service account of the Oil Works. The car mileage payments so made by the rail carriers substantially exceeded the Oil Works' car rental. During the three-year period

covered by the agreement the car mileage earnings exceeded the car rental by $33.04 per car per month on the average (R. 203, 234A, 235).

For approximately six months the Car Corporation credited the Oil Works with the full amount of the car mileage and paid over to the Oil Works the excess of the car mileage over the car rental. On July 2, 1934, the Interstate Commerce Commission issued its report in a case entitled "*Use of Privately Owned Refrigerator Cars*" 201 I.C.C. 323, 382 (1934), in which it was held that the payment to shippers of car mileage earnings, "either direct or through car owners", in excess of the amount of the rental paid for the use of the cars and other actual expenses in connection therewith, is in violation of the Elkins Act. The findings of the Commission were confined to practices in connection with the use of privately owned refrigerator cars, since the investigation itself was thus limited. But the Commission pointedly observed:

> "The discussion herein has been confined almost entirely to refrigerator cars and the findings will be so restricted, but the general principles enunciated apply equally to all other types of private cars" (R. 248).

Pursuant to this decision condemning practices of this character as violative of the Elkins Act, the Car Corporation, which theretofore had faithfully made the agreed payments, refused further to credit or pay over to the Oil Works the car mileage earnings in excess of the car rental. This change in practice on the part of the Car Corporation was based on its conclusion, upon advice of counsel following the decision of the Commission referred to above, that such payments would be in violation of the

Elkins Act (R. 193). Accordingly, commencing after the month of June, 1934, the Car Corporation credited the car mileage to the Oil Works in amounts equal to the car rental or service charges but made no payment of the excess.

By its suit at law the Oil Works sought to recover the balance of the car mileage payments which had been received by the Car Corporation during the period extending from January 1, 1934 to May 31, 1935. This balance, i.e., the unpaid excess above the car rental, amounted to $18,532.78 (R. 239). In defense the Car Corporation pleaded that it was prohibited by the Elkins Act from paying over such excess car mileage revenue to the Oil Works in that, by such payment, the Oil Works would secure the transportation of property at rates less than the tariff rates, thereby obtaining a rebate or concession and an advantage or a discrimination. The text of this plea in defense has been set forth in the answer of the Car Corporation to the complaint in the District Court in the instant case (R. 24).

The United States District Court for the Northern District of California sustained the Car Corporation's plea in defense and gave judgment accordingly for the Car Corporation. Upon appeal, the United States Circuit Court of Appeals for the Ninth Circuit reversed the judgment of the District Court (*El Dorado Terminal Company v. General American Tank Car Corporation*, 104 Fed. (2d) 903). Upon the petition of the Car Corporation this Court granted a writ of certiorari. On January 2, 1940, this Court reversed the judgment of the Circuit Court of Appeals and remanded the cause to the District Court, direct-

ing that the cause be held pending the conclusion of an appropriate administrative proceeding before the Interstate Commerce Commission. *(General American Tank Car Corporation v. El Dorado Terminal Company,* 308 U.S. 422 (1940).)

We are not in agreement with the statement appearing upon pages 6 and 7 of the appellants' brief that, in the opinion delivered on January 2, 1940, "this Court generally followed and approved the reasoning of the Circuit Court of Appeals * * *." Our understanding is to the contrary. In this connection we would direct attention particularly to the second paragraph on page 26 of appellants' brief which purports in part to summarize the holding of this Court in "its former decision." The fact is that this is a partial summary of the conclusions of the Circuit Court of Appeals set forth upon page 427 of the prior opinion of this Court, and certainly there is no implication that those conclusions received the approval of this Court. On the contrary, in important respects the conclusions of the Circuit Court were disapproved. The text of the paragraph to which we have directed this criticism is plainly erroneous and misleading.

On June 7, 1940, the Oil Works filed a petition with the Commission (R. 43-57) praying "that the Commission cause an investigation to be made of the practices disclosed by the said action, and in the said opinion of the United States Supreme Court", and that after such investigation "the Commission enter its order holding that payment by the General American Tank Car Corporation to petitioners of the amounts so collected by said tank car corporation as mileage allowances for the use of the tank

ars leased by petitioners and furnished by them to the ailroad carriers may be made as provided in and for the ntire period covered by the agreement of the parties lated September 28, 1933, without the violation of any rovisions of the Elkins Act, and that the payments so nade are reasonable and will not accomplish a rebate, oncession or an advantage or discrimination in favor of ither of the petitioners or in violation of the provisions f the Elkins Act * * *" (R. 51). The petition did not nclude a request for an investigation looking to the deter- ination and prescription of car mileage rates for general pplication. The complete text of the prayer of the petition s reproduced in the footnote.[1]

Pursuant to the petition of the Oil Works the Interstate ommerce Commission on July 24, 1940, made its order nstituting an investigation (R. 57, 58). All common car- iers by railroad participating in Trans-Continental

1. "Wherefore, petitioners pray that the Commission cause an nvestigation to be made of the practices disclosed by the said ction, and in the said opinion of the United States Supreme Court, nd after such investigation and such hearing as the Commission ay desire, the Commission enter its order holding that payment by he General American Tank Car Corporation to petitioners of he amounts so collected by said tank car corporation as mileage llowances for the use of the tank cars leased by petitioners and urnished by them to the railroad carriers may be made as provided n and for the entire period covered by the agreement of the parties ated September 28, 1933, without the violation of any provisions f the Elkins Act, and that the payments so made are reasonable nd will not accomplish a rebate, concession or an advantage or dis- rimination in favor of either of the petitioners or in violation of the rovisions of the Elkins Act, and that such other and further order r orders be made as the Commission may consider proper in the remises." (R. 51)

Freight Bureau Tariff No. 3-N, I.C.C. No. 1452, were made respondents. The matter was heard before an Examiner of the Commission on December 9 and 10, 1940. Evidence was presented on the part of the Oil Works and, in turn, on the part of the respondent rail carriers, and likewise on the part of the Car Corporation, which intervened in the proceeding (R. 61-236). The Oil Works offered no evidence looking to the determination of mileage rates; neither did it request that such evidence be produced by any party to the proceeding. No evidence tendered by the Oil Works was excluded. The Commission's report was issued under date of April 10, 1944 (R. 237-260). A petition on the part of the Oil Works for rehearing was denied (R. 261).

The Oil Works brought the instant suit, in the specially constituted District Court of three judges, praying for a decree declaring that the Commission's order is null and void and that it be set aside. From the final decree of that court, dismissing the action for want of jurisdiction, the Oil Works has prosecuted this appeal.

SUMMARY OF ARGUMENT

1. The Interstate Commerce Commission heard and determined the question which this court held to be administrative in character, and entrusted to the Commission for determination by its opinion in *General American Tank Car Corporation v. El Dorado Terminal Company, et al.*, 308 U.S. 422 (1940).

(a) The issue which was presented in the assumpsit action in the United States District Court was raised

by the Car Corporation's plea in defense that the payment of car mileage earnings to the Oil Works in an amount exceeding its car rental would violate the Elkins Act.

(b) This Court defined the administrative question held to be within the competence of the Commission, as "the question of the reasonableness and legality of the practices of the parties" under the terms and operation of the lease contract.

(c) By its petition to the Commission the Oil Works prayed that an investigation be made of "the practices disclosed by the said action" and that the Commission enter an order holding that the car mileage in full might be paid by the Car Corporation to the Oil Works without violation of law.

(d) The Commission's order of investigation, entered in response to the petition of the Oil Works, called for an investigation to determine whether the practices involved under the terms and operation of the lease contract were unlawful in violation of the Interstate Commerce Act (R. 57, 58).

(e) After full hearing the Commission found and concluded that a just and reasonable allowance as a maximum to have been paid to the Oil Works for the cars in which its shipments moved would have been an amount not exceeding the rental payable by it under the terms of the lease contract and that an allowance in excess of such rental would be unjust and unreasonable and would unduly prefer the Oil Works as a shipper of its commodities.

2. The Commission's determination "that an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement, in excess of said rental would be unjust and un-

reasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars herein involved" is fully supported by evidence.

3. The Commission correctly concluded that payment to the Oil Works of any part of the mileage earnings received by the Car Corporation from the rail carriers in excess of the amount of the car hire or rental payable by the Oil Works for the use of the tank cars would violate the prohibitions of the Elkins Act.

(a) The prohibitions of the Elkins Act are not restricted to carriers and shippers but broadly forbid concessions in respect to transportation on the part of "any person, persons, or corporation."

(b) A shipper who reaps substantial profits through the use of privately owned cars obtains thereby a rebate, concession and preference.

(c) Performance under contracts must conform with statutory requirements.

4. The Commission has not assumed to decide the civil action in assumpsit pending in the District Court; neither has the Commission "usurped the function of the District Court."

5. An administrative order of the Commission is subject to judicial review to the extent only of determining whether the order is within the scope of the Commission's authority and the basic prerequisites of proof have been satisfied.

ARGUMENT

FOREWORD—THE COMMISSION'S CONTINUING CONCERN WITH PROBLEMS ARISING FROM THE USE OF PRIVATELY OWNED CARS.

This Court has had occasion to say:

> "Violation of the commerce acts through receipt of advantages is to be tested by actual results, not by intention. Any and all means to accomplish the prohibited end are banned." (*Union Pacific Railroad Co. et al. v. United States, et al.*, 313 U.S. 450, 462) (1941)

The privately owned car has been an instrument especially favored by shipper interests who are desirous of circumventing the terms and purpose of the Elkins Act and related statutes. The law permits the use of privately owned cars but expressly subjects them to all of the requirements and restraints which govern carrier-owned cars. It is clearly the design of the statute, expressed in Section 1(3) of the Interstate Commerce Act, that all cars, "*irrespective of ownership or of any contract, express or implied, for the use thereof*", shall be so employed as to avoid conflict with the essential provisions and purposes of the governing statutes. In brief, the use of the privately owned car is permitted, but only upon the condition that it shall not serve as a means by which rebates or concessions may be obtained, or by which discrimination or preference may be practiced.

Throughout the greater part of its existence the Commission has been gravely concerned by reason of the persistence of rebating and discrimination in connection with the use of privately owned cars. This concern is disclosed particularly in the Commission's annual reports to Congress. Excerpts from certain of these reports will be found significant.

In its Annual Report for 1893 the Commission dealt at length with "*Payment of Car Mileage for Use of Private Cars*" (pp. 60 et seq.) and referred to the "many discriminations" resulting from the practice (p. 66).

In its Annual Report for the year 1903 the Commission again emphasized the "*Evils resulting from the Use of Private cars*" (p. 22 et seq.). Speaking particularly with respect to the use of stock cars, the Commission said, *inter alia*:

> "it is charged to have been the practice of the concerns owning such cars to divide with the shippers the mileage received from the railroad companies, *a practice which operated to the same effect as the payment of rebates to such shippers*. * * *" (p. 24) (Emphasis supplied.)

In its Annual Report for the year 1906 (p. 48) the Commission commented with satisfaction upon the decision of the United States Circuit Court in *I. C. C. v. Reichmann*, 145 Fed. 235 (1906), holding that a private car company which furnishes its cars to the rail carriers for the use of shippers "is within the provisions of the Elkins Law." Further summarizing this decision the Commission said:

> "The giving by such a car company of any rebate to a shipper using its cars is a violation of such statute. Such a car company is therefore subject to the jurisdiction of this Commission when inquiring into the operations of any agency of transportation which may so conduct its business as to destroy uniformity of rates. (145 Fed. Rep. 235)"

In its Annual Report for 1940 the Commission said (p. 74):

> "Other instances of the granting of concessions to shippers were revealed by investigations of the meth-

ods employed by private car companies in connection with the leasing by them to shippers of equipment which those shippers furnished to railroads for transportation of their own shipments. The car companies paid to the shippers, out of the mileage allowances which the former received from the railroads, greater amounts than the rentals paid to them by the shippers for the use of the equipment, and thus put the shippers in a position where they received transportation of their goods at less than the lawful rate."

In its Annual Report for 1941 the Commission reviewed the results of its investigation of a particular "scheme by which shippers obtained concessions from private car companies." The instance is summarized in the following terms (pp. 82-83):

"One investigation brought to light a scheme by which shippers obtained concessions from private-car companies. Shipments were tendered to railroad companies in tank cars owned by those companies which had been rented to the shippers. The railroads paid to the owners of this equipment mileage allowances for the use thereof in the performance of transportation over their rails, and the private-car companies turned over portions of such allowances to the shippers. Such payments to the shippers, instead of being made directly, were given by the private-car companies to dummy companies which had been set up for this purpose. The amounts thus paid were substantially in excess of the rentals paid by the shippers to the private-car companies for the use of the equipment. Thus the effect of the arrangement was to place the shippers in a position where they received transportation at less than the lawful rate. Informations were filed against two private-car companies and one officer of a corporation ship-

per. Upon pleas of guilty by the three defendants fines totaling $35,000 were imposed and collected."

See also Annual Report for 1889, pp. 18, 108; Annual Report for 1893, pp. 60-67; Annual Report for 1903, pp. 22-26; Annual Report for 1905, pp. 10, 11; Annual Report for 1906, p. 48.

The efforts of the Commission to eliminate improper practices in the use of privately owned cars culminated in a general investigation, nationwide in scope, instituted on the Commission's own motion on July 6, 1931. Part V of this investigation (Ex Parte No. 104) was directed specifically to "Private Freight Cars". For the purpose of hearing and investigation the proceeding was consolidated, so far as it related to refrigerator cars, with an Investigation and Suspension proceeding (Docket No. 3887) entitled "*Use of Privately Owned Refrigerator Cars*", 201 I.C.C. 323. The extended hearings and investigations thereupon conducted by the Commission eventuated in the report and decision which, as stated heretofore, brought about the change in practice on the part of the Car Corporation in the matter of the payment of car mileage.

The Commission's report contains a formidable assembly of facts, arising out of a variety of situations, revealing practices in the use of privately owned cars which are destructive of the integrity of the published freight rates and which produce discrimination and preference among shippers in varying degree. It is shown in particular that the car mileage allowances received by the car owning companies from the rail carriers and paid over to the shipper in excess of the shipper's rentals afford a means by which un-

disclosed rebates may be extended and all manner of preference may be accomplished.

It was the holding of the Commission that the payment to shippers of mileage earnings, whether directly by the carriers or through car owners, "*in excess of the amount of rental said shippers pay for the use of the cars and other actual expenses in connection therewith*", is in violation of the Elkins Act. (pp. 382-383)

It is not practicable to review the Commission's evidentiary findings in detail, but we may briefly exemplify.

(1) "The advantages claimed in using private cars are * * *" (*inter alia*) "profits derived from mileage paid by the carriers" (p. 336). (2) A particular shipper "pays $45 and $50 per car per month for its leased cars and receives mileage earnings of approximately $32.50 per car per month in excess thereof, a profit of $6,500 per month or $78,000 per year" (p. 339). (3) A shipper-lessee "refused to tell the amount it pays for the cars or to furnish a copy of its lease. The amount of profit it makes in mileage earnings cannot be determined." (p. 339). (4) A shipper leases cars "at a fixed amount per month which it refused to disclose. It admitted that the mileage earnings exceed the amounts paid the car owners" (p. 341). (5) A shipper "learning that other shippers were making money out of private cars, secured a contract under which it was to receive all mileage earnings in excess of an agreed amount. The witness refused to state the amount, but acknowledged that in 1931 payments to it by the car company averaged $18.35 per car per month, and in 1932 were $21.27 per car per month" (p. 342). (6) "The majority of the shipper protestants who rent or lease cars and of the private-car lines heard herein refused to divulge the amounts paid to or retained by said

car lines. The shippers refused on the ground that they did not feel warranted in doing so without the consent of the car lines. The car lines refused on the ground that they could not afford to do so because of the keen competition between them" (p. 380). (7) A particular car line company leases and assigns cars to private shippers. "It is opposed to the practice, and claims it does so only in order to meet competition of other private and railroad controlled car lines." (p. 364).

Such findings serve concretely to disclose the violations of the Elkins Act which must inevitably result if shipper-lessees and car-owning companies may freely bargain as to the disposition of the car mileage payments received by the car owning companies from the rail carriers for the use of privately owned cars.

We have offered this historical review of the Commission's efforts to eliminate evils in the use of privately owned cars for two purposes: *first*, to show that the abuses have been serious, and difficult to reach because of their covert character, and, *second*, to show that the conclusions reached by the Commission in the instant case are in precise harmony with its prior expressions and determinations. The Commission has been unrelenting in its hostility to the use of the privately owned car as an instrument of rebates, concessions, discrimination and preference.

I.

THE INTERSTATE COMMERCE COMMISSION HEARD AND DETERMINED THE QUESTION WHICH THIS COURT HELD TO BE ADMINISTRATIVE IN CHARACTER, AND ENTRUSTED TO THE COMMISSION FOR DETERMINATION BY ITS OPINION IN GENERAL AMERICAN TANK CAR CORPORATION V. EL DORADO TERMINAL COMPANY, ET AL., 308 U.S. 422 (1940)

It is important at the threshold to determine the nature of the issue here presented (1) as it arose in the civil action in assumpsit in the District Court, (2) as it has been formulated and characterized by this Court, (3) as it was raised in the petition of the Oil Works to the Commission, (4) as it was framed by the Commission's order of investigation, and (5) as it was determined in the Commission's report. The essential continuity of the issue throughout the successive chapters of this litigation will be apparent.

(a) The issue which was presented in the assumpsit action in the United States District Court was raised by the Car Corporation's plea in defense that the payment of car mileage earnings to the Oil Works in an amount exceeding its car rental would violate the Elkins Act.

There was but one issue of moment in the assumpsit action in the District Court. That issue was raised by the defense pleaded by the Car Corporation in its answer to the complaint. The plea in defense was briefly to the effect that the Car Corporation was prohibited by law, and particularly by the Elkins Act, from paying over to the Oil Works the excess of the car mileage revenue over the car hire or rental payable by the Oil Works, in that the latter thereby

> "would secure the transportation of property at rates less than the rates named in the published and filed

tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act." (R. 24-25)

It is conceded in appellants' brief (p. 30) that "the only issue" in the District Court was the issue arising from the defense so pleaded. The issue is properly to be characterized as the legality of the practice of payment by the Car Corporation to the Oil Works of car mileage earnings in excess of the latter's car hire or rental. On appeal the issue continued unchanged.

(b) This Court defined the administrative question, held to be within the competence of the Commission, as "the question of the reasonableness and legality of the practices of the parties" under the terms and operation of the lease contract.

In the early part of its opinion in *General American Tank Car Corporation v. El Dorado Terminal Company, et al.*, 308 U.S. 422 (1940), this Court considered matters of general principle. That discussion, however, is wholly preliminary in character. When the Court addressed itself directly to the issue which had arisen in the litigation by reason of the affirmative defense pleaded by the Car Corporation, it expressed itself as follows (p. 428):

> "We hold that the District Court had jurisdiction but that, upon disclosure of the terms and operation of the lease contract, it should not have proceeded to adjudicate the rights and liabilities of the parties in the absence of a decision by the Commission with respect to the validity of the practice involved in the light of the provisions of the Interstate Commerce Act."

The Court said further (pp. 431-432):

"* * * If it should appear that, with respect to the tank cars in question, the shipper-lessee is making substantial profits on leased cars, by reason of the excess of the mileage allowances over the rentals paid, it might in the light of all the facts be found that the shipper is, in the result, obtaining transportation at a lower cost than others who use cars assigned them by the carriers or own their own cars. The Commission has found that, in the case of refrigerator cars, held under similar leases, this has been the case.[12] The inquiry into the lawfulness of the practice is one peculiarly within the competence of the Commission.

"As the tariffs now contain no provision for the payment of car mileage allowances by the railroad to the shipper directly, and as, upon the face of things as disclosed by this record, the shipper is apparently reaping a substantial profit from the use of the cars, a clear case is made for the exercise of the administrative judgment of the Commission. The Circuit Court of Appeals, without supporting evidence in the record as to any specific items, said that there are obviously other expenses which the shipper must bear over and above the actual rental paid. If this were so, the reflection of those expenses, as well as the rental itself, in the allowance paid by the carrier to the shipper for the use of the latter's cars, would be a matter for the administrative judgment of the Commission and not for determination by a court."

"[12] Use of Privately Owner Refrigerator Cars, 201 I. C. C. 323."

The Court said again (p. 432) that

"the question of the reasonableness and legality of the practices of the parties was subjected by the Interstate

Commerce Act to the administrative authority of the Interstate Commerce Commission."

This is the language in which the Court has identified the administrative problem, has assimilated it to the problem which arose "in the case of refrigerator cars," and has plainly implied that a factual parallel would call for parallel conclusions. This is the specific issue which, as this Court said, called clearly "for the exercise of the administrative judgment of the Commission." It will be noted that the Court refers to "*the validity of the practice involved in the light of the provisions of the Interstate Commerce Act,*" namely, the practice under "*the terms and operation of the lease contract.*" The Court declares that "*The inquiry into the lawfulness of the practice is one peculiarly within the competence of the Commission.*"[2]

This Court did not say that the Commission should make an order prescribing allowances for the future. It approved the Commission's action in the *Private Refrigerator Car case*, supra, and there the Commission made no order but simply condemned the payment to shipper-lessees of allowances in excess of their actual costs as reflected by their rental payments.

This Court addressed itself to the particular issue which had arisen in the litigation by reason of the Car Corpora-

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2. It is stated in appellants' brief (p. 28) that this Court in the course of its opinion "determined that the car lease agreement was lawful." This may be misleading. The Court upheld the propriety of car leasing agreements in general but did not undertake to determine the validity of practices under the instant agreement (p. 429). That question was specifically reserved for determination by the Commission.

tion's plea in defense, viz., whether car mileage in excess of car-rental could be paid over by the Car Corporation to the Oil Works without violating the Elkins Act. This was held to be an administrative question reserved for the Commission's determination. There could have been no administrative question so reserved if this Court had intended to rule that the Oil Works is entitled to receive the excess car mileage. Nor would this Court have referred to the findings and conclusions of the Commission "in the case of refrigerator cars, held under similar leases" without implying that parallel facts would call for a parallel conclusion. The Court observed that, "upon the face of things as disclosed by this record, the shipper is apparently reaping a substantial profit from the use of the cars," and, for that reason, "a clear case is made for the exercise of the administrative judgment of the Commission." This language is wholly incompatible with the Oil Works' contention that it is of right entitled to reap this "substantial profit."

The question was left to the Commission for its administrative determination. The District Court was required to stay its hand pending the result of an appropriate proceeding before the Commission (p. 433).

(c) By its petition to the Commission the Oil Works prayed that an investigation be made of "the practices disclosed by the said action" and that the Commission enter an order holding that the car mileage in full might be paid by the Car Corporation to the Oil Works without violation of law.

The prayer of the petition filed by the Oil Works with the Commission asks that "the Commission cause an

investigation to be made of the practices disclosed by the said action" and further prays that "the Commission enter its order holding that payment by the General American Tank Car Corporation to petitioners of the amounts so collected by said tank car corporation as mileage allowances for the use of the tank cars leased by petitioners and furnished by them to the railroad carriers may be made as provided in and for the entire period covered by the agreement of the parties dated September 28, 1933, without the violation of any provisions of the Elkins Act, and that the payments so made are reasonable and will not accomplish a rebate, concession or an advantage or discrimination * * * in violation of the provisions of the Elkins Act." (R. 43, 51).

Nowhere in the petition is there a request that the Commission make an investigation looking to the prescription of a car mileage rate for general application, or a prayer for an order that car mileage at that rate be paid over to the Oil Works. On the contrary, the petition is confined specifically to "*practices disclosed by the said action;*" and its objective is an order requiring that the mileage allowances in full may be paid over to the Oil Works, notwithstanding that they substantially exceeded the car rental payable by the Oil Works for the use of the cars. In brief, the petition of the Oil Works raises nothing more than the administrative question formulated in the opinion of this Court.

(d) The Commission's order of investigation, entered in response to the petition of the Oil Works, called for an investigation to determine whether the practices involved under the terms and operation of the lease contract were unlawful in violation of the Interstate Commerce Act (R. 57, 58).

The Commission's order of investigation dated July 24, 1940 (R. 58) is fully responsive to the petition of the Oil Works. An investigation was instituted

> "(1) to determine whether the practices involved under the terms and operation of the lease contract are unlawful in violation of the Interstate Commerce Act; (2) to determine whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid by the carrier or carriers by railroad for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif., in the period January 1, 1934, to December 31, 1936; and (3) to determine what findings shall be made, or what rules, regulations or practices shall be prescribed, or what orders shall be entered, to remove any unlawfulness that may be found to exist."

It will suffice to note that the order of investigation is not only responsive to the petition of the Oil Works but that it conforms with the opinion of this Court defining and characterizing the administrative question. That question was directed to the validity of the "*practices*" under the terms and operation of the lease contract.

The Oil Works did not question the propriety or sufficiency of the Commission's order of investigation. Indeed, it could not well question the scope of the order since it was fully commensurate with the petition seeking the investigation.

(e) After full hearing the Commission found and concluded that a just and reasonable allowance as a maximum to have been paid to the Oil Works for the cars in which its shipments moved would have been an amount not exceeding the rental payable by it under the terms of the lease contract and that an allowance in excess of such rental would be unjust and unreasonable and would unduly prefer the Oil Works as a shipper of its commodities.

In due course the Commission held its hearing, in which the Oil Works was permitted to introduce all of its proffered evidence. There was no curtailment or restriction in any respect. Evidence was presented on the part of the respondent rail carriers and likewise on the part of the intervening Car Corporation. No evidence was offered looking to the establishment of a car mileage allowance for general application. There was no suggestion that evidence of that character should be adduced. The Oil Works registered no objection to the adequacy or fairness of the hearing.

All of the foregoing is plain upon the record (R. 43-236).

In due course the Commission's report was issued, in which it found and concluded as follows (R. 249-250):

> "(1) That the rental paid or to be paid by El Dorado Oil Works to General American Tank Car Corporation under the terms of the lease agreement between those parties, dated September 28, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers, to the Oil Works for the furnishing of such cars would have been an amount not to exceed such rental. Such an amount and allowance

has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation.

(2) That an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement, in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars herein involved. The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities.

(3) That the Oil Works is entitled to no allowance from the respondents, rail carrier or carriers, directly or through the Tank Car Corporation, for the special cleaning and preparation of the tank cars during the period of the agreement, January 1, 1934, to December 31, 1936."

The proceeding was thereupon discontinued (R. 260-261).

The findings and conclusions of the Commission have full record support.

It is plain from this narrative that the Commission addressed itself to the administrative question formulated in the opinion of this Court and to that question as raised in the Oil Works' petition for investigation, and that a proper and adequate hearing was held.

Most belatedly, the Oil Works argues that the Commission had no authority "to determine the validity of past transactions" but was authorized only "to deter-

time a just and reasonable allowance to be applicable for the future". (Appellants' brief, pp. 12, 13, 24, 25 and 29) Thus it is said on page 25 of appellants' brief:

> "Our construction of the provisions of Section 15(13) of the Act precludes a conclusion that the Commission had any authority under that section to determine the validity of past transactions but was authorized only, after investigation, to determine a just and reasonable allowance to be applicable for the future and to be published anew in the appropriate tariffs."

The contention now advanced that the Commission was without authority "to determine the validity of past transactions" is squarely in conflict with the petition of the Oil Works to the Commission. In that petition the Oil Works specifically invoked the authority of the Commission to determine the validity of past transactions. (R. 51) For the future nothing was sought. Having failed to persuade the Commission to rule favorably upon the issue raised in its petition, the Oil Works now assails the authority which it expressly requested the Commission to exercise.

Appellants' argument at this point is in substance and effect a challenge of the Court's conclusion that it is for the Commission to determine, as an administrative question, what payment, if any, should be made to the Oil Works for the use of the tank cars during the period covered by the suit in assumpsit. This contention is directly hostile to the prior conclusion of this Court that

> "the question of the reasonableness and legality of the practices of the parties was subjected by the

> Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission." (p. 432)

Pursuant to that conclusion the District Court was required to stay its hand "pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act." (p. 433)

The confusion in the appellants' reasoning at this point is further revealed by the following sentence reproduced from page 29 of the appellants' brief:

> "The only course open to the Commission and what must, therefore, have been intended by this Court, was a full determination, upon investigation in the light of all the facts, of a just and reasonable allowance to be paid in the future and to be set forth in the published tariffs."

It seems to be conceded, in the same paragraph from which the quoted sentence has been taken, that such published tariffs of allowances "to be paid in the future" could not have retroactive application. Whether or not this inference is correct, it is clear in any event that appellants have misconstrued the prior holding of this Court. Returning to page 430 of the Court's opinion, it will be noted that the Court has addressed itself to two somewhat distinct problems. As to the first, the holding is that if the carrier fails to set forth an allowance in a published tariff "the shipper may complain to the Commission, to the end that a proper allowance be ascertained and made effective by a schedule duly published." After observing that in the present case this has not been done, the Court approaches the second and the immediate problem as follows:

"Nor has the shipper ever applied to the Commission for its decision as to what was a proper allowance for the cars furnished by it."

It is this latter expression of the Court which is pertinent here. It is prefatory of all that follows, and the entire discussion thenceforth is directed to past transactions. The Court states (p. 432):

"As the tariffs now contain no provision for the payment of car mileage allowance by the railroad to the shipper directly, and as, upon the face of things as disclosed by the record, the shipper is apparently reaping a substantial profit from the use of the cars, a clear case is made for the exercise of the administrative judgment of the Commission."

We need not quote further. Enough has been set forth to make it clear that the administrative question which the Court entrusted to the Commission was the determination of such allowance as might be made for the *past*, that is, for the period covered by the action pending in the District Court. Nothing would have been gained by an inquiry looking to the prescription of car mileage rates for future application. The construction which the appellants now seek to impress upon the prior opinion of this Court would require virtually the complete erasure of all that has been said by the Court in the last three pages of its opinion. The Commission is plainly right in saying (R. 249):

"Were we to attempt to determine the reasonableness of allowances for a 'class' of tank cars such as these, we cannot tell how far reaching the investigation would have to be. Its result would be futile * * *."

Any determination that might be reached in such an investigation would, of necessity, be prospective in character. It would not serve to determine the specific question which arose in this litigation and which the Commission precisely determined.

This Court not only defined the administrative question and identified it with the question which had arisen in the course of the litigation in the District Court, but it relied upon its decision in

Mitchell Coal & Coke Co. v. Pennsylvania Railroad Company, 230 U.S. 247 (1913),

as a precedent for the disposition of the instant controversy. That case related entirely to past transactions. Answering the contention that the claim related to past transactions, the Court noted that:

> "* * * it is urged that a claim based upon the unreasonableness of past rates and discontinued practices raises a judicial question, of which the courts and not the Commission have jurisdiction." (p. 258)

But the Court said:

> "In considering the administrative questions as to reasonableness, the elements of the problem are the same, whether they involve the validity of obsolete allowances, discarded tariffs or current rates and practices. * * *
>
> As to past and present practices or allowances, the Commission has the same power and there is the same necessity to take preliminary action." (pp. 258, 259)

It is clear, accordingly, that in the cited case the Court was dealing with past practices and held that jurisdiction to determine their reasonableness and legality was vested

in the Interstate Commerce Commission. Upon the authority of that holding, it entrusted to the Commission the determination of "the reasonableness and legality of the practices of the parties" under the contract out of which the instant controversy has arisen.

Quite inexplicably, as it seems to us, the appellants rely upon the decision of this Court in *Great Northern Railway Co. v. Merchants Elevator Company*, 259 U.S. 285 (1922) and quote from the opinion of the Court as follows:

> "To determine what rate, rule or practice shall be deemed reasonable for the future, is a legislative or administrative function. To determine whether a shipper has in the past been wronged by exaction of an unreasonable or discriminatory rate is a judicial function." (Appellants' Brief, p. 23.)

But the appellants omit to quote the immediately succeeding sentence in that opinion of this Court reading as follows (p. 291):

> "*Preliminary resort to the Commission is required alike in the two classes of cases.*" (Emphasis supplied.)

There is nothing in the opinion of this Court in the cited case which affords support for the contentions of the appellants. The decision went no further than to hold that the construction to be given to a railroad tariff presents ordinarily a question of law and does not require preliminary resort to the Commission.

Appellants' contentions are not only incompatible with the ruling of this Court in its prior decision but they constitute a complete reversal of the position taken by the Oil Works in the proceeding before the Commission. We have seen

that by its petition to the Commission the Oil Works pra
that the Commission "cause an investigation to be
of the practices disclosed by the said action" and
the Commission enter its order that payment by the
Corporation to the Oil Works of the amounts colle
as mileage allowances "may be made as provided in
for the entire period covered by the agreement of
parties dated September 28, 1933, without the viola
of any provisions of the Elkins Act * * *." (R. 51) Cle
this prayer is directed to past practices and not at a
the determination of "a just and reasonable allow
to be paid in the future and to be set forth in the
lished tariffs".[3] It does not look to any future determ
tion of any character.

Moreover, in the opening statement of counsel for
Oil Works in the proceeding before the Interstate C
merce Commission it was made entirely clear that the
Works was asking "that this Commission shall in
form determine in line with the decision of the Supr
Court of the United States that the agreement betwee
Tank Car Corporation and the El Dorado Oil works
not an unlawful agreement, and that there was no

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3. The brief for the Oil Works overlooks the fact that S
15(13) of the Act was not so amended as to require the public
of mileage allowances in tariffs or schedules until Septembe
1940. For convenient reference the text of paragraph 15(13)
appeared prior to the amendment and also thereafter will be f
in the appendix to this brief. The first statutory requirement
car mileage alowances "be published in tariffs or schedules" be
effective on September 18, 1940, five years after the institut
suit by the Oil Works against the Car Corporation, and subsequ
also to the filing of the petition of the Oil Works with the
mission.

or moral obstacle in the way of its performance by both parties." (R. 73)

Not only so but counsel for the Oil Works objected to the receipt of evidence respecting the operations of the Car Corporation "in respect of all of its tank cars", insisting that the investigation should be limited to "the cars of the El Dorado Works". (R. 206, 209). The objections thus made are plainly inharmonious with the contentions now advanced that the Commission should have conducted an investigation looking to the determination of car mileage rates for future application.

It is far from the fact, as represented upon page 32 of the appellants' brief, that the Commission has in effect "commanded the carriers to violate the express provisions of the Act." The Commission has made no "order" with which the carriers are expected to comply. Neither are the appellants on tenable ground when they argue that the Commission in effect "sanctioned" the payment by the carriers to the Car Corporation of that part of the car mileage which exceeded the car rental (Appellants' Brief, pp. 13, 14). Neither directly nor by implication has the Commission expressed itself with respect to any payment to the Car Corporation. Its ruling does not go beyond the issue before it, viz., a determination of the amount of the allowance which might lawfully be paid to the Oil Works.

It is plain that the Commission's action is not only directly responsive to the petition for investigation filed with the Commission by the Oil Works, but that it is within the express terms of the ruling of this Court as to the character of the issue and the authority of the Commission over its determination.

II.

THE COMMISSION'S DETERMINATION "THAT AN ALLOWANCE TO THE OIL WORKS BY THE RESPONDENTS, RAIL CARRIER OR CARRIERS, OR BY THE TANK CAR CORPORATION, UNDER THE AGREEMENT, IN EXCESS OF SAID RENTAL WOULD BE UNJUST AND UNREASONABLE, AND WOULD UNDULY PREFER THE OIL WORKS AS A SHIPPER OF ITS COMMODITIES TRANSPORTED BY IT IN THE TANK CARS HEREIN INVOLVED" IS FULLY SUPPORTED BY EVIDENCE.

The uncontradicted evidence of record shows that the Oil Works' only cost in the use of the leased cars, for which it could lawfully be compensated, was its car rental. The evidence also showed, and again without dispute, that the car mileage earnings were greatly in excess of the car rental. Upon these facts it was clear that the Oil Works would reap "substantial profits" if it should receive the excess of the car mileage over the car rental.[4] Such "profits", in the view of the Commission, would be rebates and concessions, and would unduly prefer the Oil Works as a shipper of its commodities, in violation of the Elkins

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4. Appellants rely upon the decision in *Interstate Commerce Commission v. Diffenbaugh*, 222 U.S. 42 and upon the report of the Commission *In re Private Cars*, 50 I.C.C. 652, in support of their asserted right to realize a "profit" from the use of the cars (Appellants' Brief, p. 153). The decision in the first of these two cases goes no further than to hold that compensation by the rail carriers to one furnishing a transportation service (e.g., elevation of grain in transit) is not prohibited by the Elkins Act if the amount paid is neither unreasonable nor discriminatory and does not result in a rebate or other concession. The opinion shows that the published allowance "barely would pay the cost of the service rendered" (p. 47). In the second of these two cases it is said on page 687 of the report of the Commission: "It is conceded by car owners that they are not properly entitled to make a profit on their cars used by the carriers."

Act and other provisions of law. The Commission had previously condemned such payments to shippers, in excess of their car rental and other costs, by its decision in *Use of Privately Owned Refrigerator Cars*, 201 I.C.C. 323 (1934).

The appellants contend that the findings of the Commission are not supported by evidence. Plainly these contentions are without merit.

The Commission has found that the Oil Works showed "no item of cost in furnishing the tank cars to the carriers, for which the latter were liable under their obligations as common carriers, other than the rental." (R. 243) Reference is made to an expense incurred "for special cleaning and preparation of the cars used," but it appears that "the railroads, upon request, cleaned in the usual manner all the tank cars furnished." (R. 243) The Oil Works did not contend that the rail carriers were obligated to perform "the special cleaning services." The Commission found that such services were not "a common carrier obligation," and pointed out that the Oil Works would have had to stand the same expense "whether it owned the cars, or even if they were furnished by the carriers." (R. 243) Certainly these findings are beyond successful attack.

The Commission has found that the car mileage earnings exceeded the car rental payable by the Oil Works in substantial amounts. (R. 238, 239, 240) Thereupon, the Commission found further (R. 248-249):

> "The present record shows how under contracts such as the one between the Oil Works and the Tank Car Corporation the Oil Works, as shipper, would

reap a profit on the leased cars so substantial in amount, if paid over by the rail carriers out of the transportation charges through the Tank Car Corporation to the Oil Works, as to have the result of enabling the Oil Works thereby to obtain the transportation of the commodity it ships in interstate commerce at a lower cost than others who use cars assigned to them by the carriers, or who own their own cars."

These findings have full record support. Exhibit No. 9 received before the Commission (R. 203, 234A, 235) shows that during the three-year period covered by the contract the car mileage earnings exceeded the service charges on the average by $33.04 per car per month. Throughout the entire period extending from January 1, 1926, to September 30, 1940, the excess of the car mileage over the service charges amounted on the average to $26.34 per car per month. This exhibit may be considered in conjunction with Exhibit No. 10 (R. 211, 236) which presents the results of a study of all car service contracts in effect during the period extending from July 1, 1934 to September 30, 1940, in which it was provided that car mileage should be credited to the shippers in whole or in part. It appears that relatively few of the total number of cars in the service of shippers under contracts of this character have earned mileage in excess of the car rental or service charges. For example, in the year 1935 only 4% of the cars in service under such contracts earned excess mileage, and the cars which earned this excess mileage constituted

only 1.7% of the total number of cars then owned by the Car Corporation. In the light of this showing, it is clear beyond the possibility of dispute that comparatively few shippers of commodities in tank cars have profited through the car mileage allowance. It is clear, further, that the shipper-lessee whose cars have earned the greater amount of excess mileage would have a financial advantage over his competitors if the excess mileage should be paid over to him. In addition, a shipper-lessee to whom excess mileage is paid enjoys an advantage over the shipper who receives cars by assignment and is paid no mileage.

The undue preference found by the Commission consists in the fact that under the arrangement between the Car Corporation and the Oil Works the latter would receive the excess car mileage while other shippers, having less favorable arrangements, would receive no such payments. (R. 190, 192)

The Commission's findings not only have full record support but it is plain that the record does not admit of findings of different or contrary import.

Appellants refer to the "profit above the car rentals for the period during which the Car Company had paid over the mileage collected by it," and add that "The profit so realized was not a rebate, nor do the appellees make that claim." (Appellants' Brief, p. 15.) On the contrary, appellees do claim that the profit so realized by the Oil Works was a rebate, in that it served by that amount to reduce the Oil Works' transportation costs. The Commission found and concluded by its report herein that

"The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms

> of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities." (R. 250)

Appellants are in error in assuming that the Commission's findings have been rested in part upon the findings in the *Refrigerator Car Case*. (Appellants' Brief, p. 16) As the report plainly shows, the Commission's findings are based wholly upon the record in the instant case, and the Commission has done no more than note the comparability of the facts disclosed in the two proceedings. The appellants' reliance upon the decision in *Erie R. Co. et al. v. United States*, decided March 24, 1944 (Appellants' Brief, p. 16) is misplaced, since in that case it was admitted that the Commission's findings were not supported by any evidence of record before it.

The Oil Works contends upon brief that the carriers received their full freight charges under the applicable freight tariffs. (p. 17) This contention misses the point. The point is that the receipt by the Oil Works of the excess of the car mileage over the car rental and other actual expenses, if any, which the carriers are permitted to bear, would operate automatically to reduce the tariff rate. It is this excess car mileage which constitutes the "substantial profit" which the Commission condemned in *Use of Privately Owned Refrigerator Cars, supra,* as a rebate or concession and an unjust discrimination. As the Commission said on page 381 of its report in that case:

> "It cannot be denied that the net cost of the transportation to users of leased and rented cars is reduced by the amounts received in excess of the costs to them and that they are thereby removed from that absolute level of equality with other shippers which the statute

was enacted to establish and that the purpose of the legislation is defeated."

The Oil Works claims to be entitled to reap this profit out of the use of the privately owned cars, but it is for the Commission to determine whether the shipper may enjoy such profit without violation of law. We need not debate the merits of the issue. It is enough that the Commission has determined, upon evidence which admitted of no different determination, that the prohibitions of the law against rebates and concessions and preference and discrimination would be set at naught if shippers favored by particularly advantageous car-leasing agreements were permitted to enjoy the substantial profits represented by the excess of car mileage earnings over car rental and other expenses.

It is not material that the freight charges may have been paid by the consignees (Appellants' Brief, p. 17).[5] The Commission properly disposed of that contention in its report (R. 244-245).

Northern Central Ry. Co. v. United States, 241 Fed. 25 (C.C.A. 2nd, 1917);

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5. The comments in Appellants' Brief (p. 19) upon the decisions in *Northern Central Railway Co. v. United States*, 241 Fed. 25 and *Elgin J. & E. Ry. Co. v. United States*, 253 Fed. 907, reveal failure to grasp the point to which they were cited. In each of these cases it was held that payment of the freight charges by the consignee, rather than by the shipper, could not absolve the shipper from a charge of rebating. As was said in the latter of these two cases (p. 911): "the shipper obtains the transportation and is primarily liable for the freight charges, regardless of his contractual relations with his consignee governing the ultimate payment thereof."

Elgin, J. & E. Ry. Co. v. United States, 253 Fed. 907, 911 (C.C.A. 7th, 1918);

Ohio Tank Car Co. v. Keith Railway Equipment Company, 148 Fed. (2d) 4 (C.C.A. 7th, 1945) (Cert. Den. Oct. 8, 1945, 66 Sup. Ct. 38).

It is said in the brief for the Oil Works that the issue raised by the Car Corporation's plea in defense "involved a question of fact." (p. 30) If so, it would not aid the contentions of the Oil Works. But this Court has held that this is "a matter for the administrative judgment of the Commission and not for determination by a court."

The Commission's determination is within its administrative authority, and, being supported by substantial evidence, is conclusive.

III.

THE COMMISSION CORRECTLY CONCLUDED THAT PAYMENT TO THE OIL WORKS OF ANY PART OF THE MILEAGE EARNINGS RECEIVED BY THE CAR CORPORATION FROM THE RAIL CARRIERS IN EXCESS OF THE AMOUNT OF THE CAR HIRE OR RENTAL PAYABLE BY THE OIL WORKS FOR THE USE OF THE TANK CARS WOULD VIOLATE THE PROHIBITIONS OF THE ELKINS ACT.

According to our understanding, this review upon the merits extends only to a determination of (1) whether the Commission heard and determined the administrative question entrusted to it by the prior decision of this Court and (2) whether the Commission's findings are supported by the evidence. If the scope of judicial review should be enlarged so as to comprehend a determination of whether this Court, upon the same record, might have reached a conclusion differing from that reached by the Commission.

the Court would thereby be ruling upon a question which it has held to be administrative in character and committed by the statute to the Commission for its decision. This, we understand, will not be undertaken by the Court. It will not seek to pass upon "the question of the reasonableness and legality of the practices of the parties" since this question has been "subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission."

While the argument thus far made would seem to comprehend the scope of judicial review, we shall proceed briefly to show that the conclusions of the Commission are in conformity with the consensus of authority.

(a) The prohibitions of the Elkins Act are not restricted to carriers and shippers but broadly forbid concessions in respect to transportation on the part of "any person, persons, or corporation."

The Car Corporation is not a common carrier. Nevertheless, it is not permitted to conduct its operations in such fashion as to enable shippers to evade the statutory prohibitions. Although its status is that of "a third person", its relations with shippers in the field of interstate commerce are not thereby placed beyond the reach of law. In the comparatively recent case of

Union Pacific R. R. Co. et al. v. United States, et al., 313 U. S. 450 (1941)

this Court held that the prohibitions of the Elkins Act are not restricted to the actions of carriers and shippers only but include "action by any person to bring about discriminations in respect to the transportation of property. * * *"

We quote briefly from the Court's opinion (pp. 462-463):

"* * * Section 1, quoted in note 1, has a provision making it unlawful for any person to give or receive any concession in respect to transportation. A subsequent clause makes the act of giving or receiving a concession a misdemeanor and punishes its violation by 'every person or corporation, whether carrier or shipper.' Obviously a bonus paid by a railway to induce a prospective shipper to locate along its line would be as much a concession under the statute as a reduction in tariff applicable only to the favored shipper. We are of the opinion that such a payment by a person who is not a carrier, if it is a payment 'in respect to transportation,' would be equally violative of the section in question. * * * The appellants' argument that only carriers or shippers are covered is based on the clause stating the punishment to be applicable whether the alleged violator is 'carrier or shipper.' Such an argument assumes that the carrier and shipper clause restricts the ordinary meaning of 'any person.' No reason is advanced for such a restriction. * * * In our view, action by any person to bring about discriminations in respect to the transportation of property is rendered unlawful by the Elkins Act. Any other conclusion would do violence to a dominant purpose of carrier legislation." (Citing with approval the earlier decisions in *Interstate Commerce Commission v. Reichmann*, 145 Fed. 235 (1906) and *Spencer-Kellogg & Sons v. United States*, 20 Fed. (2) 459 (1927).)

In view of these recent and authoritative expressions of the Court, citation of additional decisions to the same effect would be superfluous.

(b) A shipper who reaps substantial profits through the use of privately owned cars obtains thereby a rebate, concession and preference.

It has been shown that the Commission has steadfastly adhered to the principle that the privately owned car may not be used as an instrument of "profits" to the shipper or as a means to an advantage, concession or discrimination in any form. It is worthy of note that the Commission's views are in strict accord with decisions of the courts in cases of cognate character.

In the case of

Interstate Commerce Commission v. Reichmann, 145 Fed. 235 (C. C., N.D., Ill., 1906)

the court upheld the right of the Commission to require an officer of a private carline company to answer the following question:

> "What part of the mileage, or from whatever source, have you given up to shippers during the last six months?"

The propriety of the question turned solely on whether the payment of the car mileage to the shippers would tend to reveal a violation of the Elkins Act. The Court held that by such payment the Act would be violated. In its opinion the Court said, *inter alia*:

> "That the person to whom the payment is made has been, thereby, removed from the level of equality, to establish which the laws were passed, is too plain to justify extended consideration. With respect to the transportation of his property, he is just as much better off than the general run of shippers as the payment amounts to. That net cost of the transaction to him—his

freight expense—has been reduced just that much.'" (p. 237)

The brief for the Oil Works seeks to distinguish this case upon the ground that the sole issue was "the power of the Commission, on examining a witness who was president of a private car company, as to his agreement with a car user in respect of beneficial allowances inducing the shipper's action in transportation." (Appellants' brief, p. 20.) It is plain, however, that no distinction of substance is possible. The question asked by the Commission would have been irrelevant except for the Court's holding that the answer might disclose an unlawful payment of car mileage by the car-owning company to the shipper.

In

Spencer Kellogg & Sons v. United States, 20 Fed. (2) 459 (C.C.A. 2nd, 1927) (Certiorari denied, 275 U. S. 566)

a rebate or concession was accomplished through the payment by an elevator company to a shipper of a portion of the allowance made by the rail carrier for the elevation of grain in transit from water to rail. The carrier had no part in the transaction. Nevertheless, the payment was held to be in violation of the Elkins Act, irrespective of the fact that the elevator company was not a common carrier but an intervening third person. The Court said:

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6. This decision was cited with approval by this Court in a footnote on p. 463 of the opinion in *Union Pacific Railroad Co. v. United States, supra*, in the following terms: "See Interstate Commerce Commission v. Reichmann, 145 F. 235, 240, rebate by non-carrier private car company to shipper, decided prior to the addition of the clause 'whether carrier or shipper' by the Act of June 29, 1906."

"Congress intended to prohibit all rebates, concessions or discrimination with respect to railroad transportation service. This was not confined to the regulation of carriers and shippers." (p. 461.)[7]

The brief for the Oil Works seeks to distinguish this case from the instant case (Appellants' brief, p. 20), but they are plainly analogous in this, that in each instance an intermediary is the means through which a shipper obtains a payment which in effect reduces his transportation charges. A single governing principle is involved, and that principle is that a shipper is not permitted, through the action of an intervening third party furnishing a service or an instrument of transportation, or otherwise, by any device, to defeat tariff rates or to obtain an advantage.

The recent decision of the Circuit Court of Appeals for the 7th Circuit in

Ohio Tank Car Company v. Keith Railway Equipment Company, 148 Fed. (2) 4 (1945) (Certiorari denied by this Court on October 8, 1945, 66 Sup. Ct. 38)

is squarely in point. There, as here, the shipper-lessee of certain privately owned cars brought suit against the car-owning company for mileage allowances which had

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7. The decision in the case here cited likewise received the approval of this Court in *Union Pacific Railroad Company, et al, v. United States, supra.* This Court said, upon page 463 of its opinion: "For example, in Spencer Kellogg & Sons v. United States, 20 F. (2) 459, a grain elevator owner, without carrier affiliation or cooperation, was convicted for sharing its allowance for elevation service with a shipper."

been withheld by the car-owning company upon the ground that payment to the shipper-lessee would violate the Elkins Act. The District Court ruled that such payments would be violative of the Act and its judgment was affirmed upon appeal. In the course of its opinion the Circuit Court of Appeals said (p. 7):

> "It seems clear that plaintiff, even though its charter permitted it to do so, could not engage also in the business in which Akin is engaged, and participate in an allocation between the plaintiff and defendant of the mileage allowance earned by the cars, without running counter to the quoted provisions of the Elkins Act. Otherwise, plaintiff, as a seller and shipper of oil, then would be receiving an advantage not extended to its competitive sellers and shippers of oil."[8]

Thus, the rulings of the courts conform with the rulings of the Commission in holding that the privately owned car may not be so used as to defeat the prohibitions of the Elkins Act against rebates, concessions, preference or advantage in any form.

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8. In Appellants' Brief (pp. 19-20) an effort is made to distinguish this case upon the ground that it involved "an arrangement whereby a shipper received the benefit of a concession in freight charges through payments made to its wholly-owned subsidiary where the officers, directors and stock owners of both companies were the same." It is plain, however, that the attempted distinction is devoid of either technical or substantial merit. Indeed, the decision in the cited case is the stronger inasmuch as the recipient of the excess of the car mileage over the rental was not the shipper itself but a separate corporation under common control with the shipper. In the instant case, on the other hand, the shipper is the direct beneficiary of the arrangement.

(c) Performance under contracts must conform with statutory requirements.

Argument is hardly needed to sustain the generic principle that "private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict." The quoted words are from the opinion of the Supreme Court of the United States in

Union Dry Goods Co. v. Georgia P. S. Corp., 248 U. S. 372, 375 (1919).

The cases which declare and enforce this principle are numerous, and included among them are many which have arisen under the Interstate Commerce Act and related statutes. A few citations will suffice.

United States v. Union Stockyard & Transit Co., 226 U. S. 286, 309 (1912);

New York, New Haven & Hartford R.R. v. I.C.C., 200 U. S. 361, 402 (1906);

Armour Packing Co. v. U. S., 209 U. S. 56, 81-82 (1908);

Louisville & Nashville R.R. v. Mottley, 219 U. S. 467, 474 (1911).

When it appeared that further payment by the Car Corporation to the Oil Works of the excess of the car mileage over the car rental would result in substantial profits to the Oil Works through the use of the leased cars, it was incumbent upon the parties to conform their practices under the car service agreement to the requirements of law. They were placed on definite notice of their duty in this respect by the report of the Commission in *Use of Privately Owned Refrigerator Cars*, 201 I.C.C. 323

(1934), in which it was held that the profits represented by such excess mileage payments constitute a rebate or concession. Thereupon the Car Corporation felt compelled to modify its practice under the contract so as to limit the car mileage credits to the amount of the car hire or rental payable by the Oil Works. Following this change in practice the Oil Works has been denied its expected profits but it has been fully reimbursed for the costs actually incurred by it in the use of the leased cars. It has been shown heretofore that the Oil Works incurred no expenses, other than the car hire or service charges, in the use of the cars and for which an allowance may be claimed either through car mileage payments or otherwise.

Thus, since July, 1934, in obedience to the principles announced by the Commission, particularly in its report in *Use of Privately Owned Refrigerator Cars*, 201 I.C.C. 323 (1934), abuses in the use of privately owned cars have been effectively suppressed. (R. 193-4) It is not permitted to car-owning companies and shippers to enter into arrangements or engage in practices whereby the shippers are enabled to reap "profits" in varying amounts out of the excess of the car mileage allowances over their car hire or rental. Privately-owned cars are not presently employed as instruments whereby rebates and concessions may be obtained and preference and discrimination may be practiced.

Let us briefly consider the consequences which would flow from disapproval of the principles which the Commission has followed and to which it has adhered in the instant case. Jungle law would return to hold sway over the practices of car-owning companies and shippers in the

use of privately owned cars. The arrangements and practices would vary with the varying force of "shipper pressure", and the shipper possessed of the greater power or skill in bargaining would inevitably have the advantage over his competitors. Rebates and concessions in fact would flourish, and preference and discrimination would be unrestrained. To exemplify, we may postulate alternative arrangements with different shippers as follows:

> First, a lease, contract or other arrangement whereby the shipper-lessee receives the entire excess of the car mileage earnings over the car hire or rental;
>
> Second, a lease, contract or other arrangement whereby the shipper-lessee receives but one-half of the excess of the car mileage earnings over the car hire or rental;
>
> Third, an arrangement whereby the shipper-lessee is credited with the car mileage earnings in the amount of his car hire or rental, and not more.

It should be exceedingly plain that these three shipper-lessees are not upon "*that absolute level of equality*", in the use of cars, which the statute was designed to accomplish. It is equally clear that the shipper-lessee who reaps substantial profits, measured by the excess of the car mileage earnings over the car rental, has received money which, in fact, reduces his transportation cost. If his car hire is $30.00 per car per month while the car mileage earnings paid over to him amount to $50.00 per car per month, he enjoys an effective rebate of $20.00 per car per month. In the words of the court in *Interstate Commerce Commission v. Reichmann*, 145 Fed. 235, 237 (1906), "*the net cost of the transaction to him—his freight expense—has been reduced just that much.*"

It is not an answer that the carrier is not a knowing participant. We have noted that the Act forbids concessions in respect to transportation by "any person, persons, or corporation". Moreover, the source of the car mileage payments is in the revenues of the carriers, and the circumstance that a private car-owning company may be the medium through which payment to the shipper is accomplished cannot serve to alter the effect of the transaction. It would still be the fact that payment of the excess car mileage to the shipper would result in his obtaining transportation service "at a cost below the regular tariff".

The cases which have been postulated above are not hypothetical merely. The record before the Commission affords concrete exemplification of the practices which have been indicated as well as of the results which they yield. The business of supplying privately owned cars to shippers is a competitive business. The contractual relations between the Oil Works and the Car Corporation are of long standing. Prior to the year 1925 it was the practice of the Car Corporation under its contracts with the Oil Works to credit the latter with car mileage only to the extent of the car-hire. Under that practice there was no "profit" to the Oil Works in the use of the cars. In 1925 competitive pressure forced the Car Corporation to make a contract whereby the full amount of the car mileage earnings would be credited to the Oil Works. Again, yielding to a further manifestation of the competitive element, the Car Corporation lowered its car service charge, in the contract entered into with the Oil Works in September, 1933, to become effective on January 1, 1934, from the prior rate of $32.50 per car per month to $27.50 per car per month.

(R. 189-191). This concession was made "in order to hold the business". (R. 198)

The record shows further that during the years 1934 to 1936, inclusive, the Car Corporation was supplying tank cars to shippers under various contractual arrangements. These arrangements differed with respect to the provisions for payment to shippers of the excess of the car mileage over the car service charges. "It was a matter of meeting the competition." (R. 190, 192). The Car Corporation has likewise furnished cars from time to time upon "assignment", that is, upon special request rather than under any formal contract. In such instances the car mileage earnings are collected and retained by the Car Corporation, no payment being made to the shipper. (R. 192)

This review of the record could be extended but we think the foregoing will suffice to exemplify the inequalities which would exist among shippers in the use of privately owned cars if arrangements for the use of such cars were to be determined by "the haggling of the market-place". Such results are unavoidable if the parties are free to make arrangements whereby the excess of the car mileage earnings over the car rental are to be paid over to the shipper-lessees, either in whole or in part.

The Commission finds in its report that during the years 1926 to 1933, inclusive, the mileage payments made by the Car Corporation to the Oil Works exceeded the car rental by $161,684.94. The record also shows that during the period of three years covered by the contract with which we are here concerned (1934-1936), the excess of the total mileage earned over the total car hire or service charges amounted in the aggregate to $64,232.02. (R. 203, 235)

Reduced to a monthly basis, the excess car mileage amounted on the average to $33.04 per car per month. This is the measure of the "profit" realizable by the Oil Works under the terms of the arrangement between the parties.

The Oil Works insists that the excess of the car mileage earnings over the car hire or rental may be paid over to it without violation of law and has asked the Commission so to find and order. In the prayer of its petition to the Commission the Oil Works asks that the Commission enter its order holding that payment by the Car Corporation to the Oil Works of the amounts collected as mileage allowances by the carriers "may be made as provided in and for the entire period covered by the agreement of the parties dated September 28, 1933, without the violation of any provisions of the Elkins Act, and that the payments so made are reasonable and will not accomplish a rebate, concession or an advantage or discrimination * * *." (R. 51, 240) But the Commission has held to the contrary. Its holding is in these terms (R. 245-6):

> "The payment by the Tank Car Corporation to the Oil Works of moneys received from the rail carriers in respect of the transportation of the Oil Works' goods, over and above the amount of money paid by the Oil Works to the Tank Car Corporation as rental for the cars furnished and used would, in our opinion, constitute a rebate and discrimination and involve a departure from the tariff rules applicable, prohibited by Section 1 of the Elkins Act, and Section 6(7) of the Interstate Commerce Act, and we so find."

By this holding the Commission has directly answered the prayer of the petition filed by the Oil Works with the Commission. In the result the Commission has done no more than to rule that the practices of the parties under the contract must conform with the requirements of law.

IV.

THE COMMISSION HAS NOT ASSUMED TO DECIDE THE CIVIL ACTION IN ASSUMPSIT PENDING IN THE DISTRICT COURT: NEITHER HAS THE COMMISSION "USURPED THE FUNCTION OF THE DISTRICT COURT."

It is difficult to believe that this particular criticism of the Commission's action has been seriously tendered. We have seen that by its prior decision this Court expressly ruled that "the question of the reasonableness and legality of *the practices of the parties* was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission." (Emphasis supplied) That question had been raised by the Car Corporation's plea in defense, and it was that question, and none other, which this Court held to be administrative in character.

The case was remanded to the District Court to be there held "pending the conclusion of an appropriate administrative proceeding." The hand of the District Court having thus been stayed, the appellants filed their petition with the Commission asking that an investigation be made of the practices of the parties under the agreement and that the Commission determine the administrative question which had been entrusted to it by this Court. Upon investigation the Commission determined that the practice of paying car mileage allowances to the Oil Works in amounts ex-

ceeding the car rentals payable under the agreement "would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities * * *." (R. 250) That determination having now been made, in proper course it will presumptively be brought to the attention of the District Court, which will thereupon be freed from stay. Action on the part of the Commission is a condition precedent to a judgment in the action in assumpsit pending in the District Court. The appellants, therefore, fail to give effect to the prior ruling of this Court when they complain that the Commission has assumed to decide the civil action. The Commission has done no more than to make the determination which must be made in order to permit the District Court to proceed.

The Commission has made no order forbidding the payment of the moneys in dispute to the Oil Works. It has made its findings and conclusions and thereupon ordered that the proceeding be "discontinued". (R. 260, 261.) The order was not "an order of dismissal" of appellants' petition, as inexactly stated in the brief for the Oil Works (p. 7). Clearly there is nothing in what the Commission has done which can be challenged as an usurpation of the function of the District Court.

V.

AN ADMINISTRATIVE ORDER OF THE COMMISSION IS SUBJECT TO JUDICIAL REVIEW TO THE EXTENT ONLY OF DETERMINING WHETHER THE ORDER IS WITHIN THE SCOPE OF THE COMMISSION'S AUTHORITY AND THE BASIC PREREQUISITES OF PROOF HAVE BEEN SATISFIED.

The Court is not an appellate administrative tribunal. The scope of review permitted to the Court is definitely limited. As this Court said in

United States v. New River Company, 265 U.S. 533, 542 (1924):

"The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions."

In the more recent case of

Rochester Telephone Corporation v. United States, 307 U.S. 125, 139-140 (1939),

it was held:

"Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable."

There are many other decisions to the same effect but it will be unnecessary to cite them. Beyond question the Commission has acted within the scope of its constitutional and statutory power. This Court has ruled that this issue is administrative in character and that it is within the competence of the Commission. Certainly also the basic prerequisites of proof have been satisfied. The order is therefore incontestable and a reviewing court will not substitute its judgment for the judgment of the Commission.

This is a case which will determine whether there is to be a revival of the now discredited practice of using the private car as a means or device for obtaining rebates, concessions and preference. It would be impossible to sup-

press these evils, long condemned by the Commission, if this shipper were permitted to recover car mileage in amounts exceeding the rental paid for the use of the cars because, if contracts providing for the payment of such amounts in excess of the car rental were enforceable, such contracts would be made. The circumstances under which the private car business must be conducted make that inevitable. Here the shipper frankly asserts the right to derive such advantages from the use of this instrumentality of transportation, even though it might "result in some shippers enjoying a profit and possibly transporting their commodities at a lesser rate than others * * *." (Appellants' Brief, p. 29) If the shipper should succeed in attaining that objective, notwithstanding the Commission's determination of the question committed to it by this Court, the practical result would be effectively to nullify the prohibitions of the Elkins Act as far as the use of privately owned cars is concerned.

CONCLUSION

(1) The Commission has heard and determined the administrative question formulated by this Court and raised in the petition filed with the Commission by the Oil Works;

(2) The Commission's determination is "within the competence of the Commission," as declared by this Court;

(3) A full and adequate hearing was afforded;

(4) The Commission's findings and conclusions have full record support;

(5) The Commission's determination of the administrative question is final and conclusive.

The final decree of the District Court should be affirmed.

Respectfully submitted,

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Dated at San Francisco, California, March 18, 1946.

(APPENDIX FOLLOWS)

APPENDIX

STATUTORY PROVISIONS INVOLVED

Elkins Act. Sec. 1, pars. 1 and 2:

"That * * * it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars; *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years,

or both such fine and imprisonment, in the discretion of the court. * * *"

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act." Act of Feb. 19, 1903, c. 708, 32 Stat. 847, as amended by Act of June 29, 1906, c. 3591, 34 Stat. 587; 49 U.S.C., Sec. 41 (1) and (2).

Interstate Commerce Act, Sec. 1 (3):

"* * * The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Act of Feb. 4, 1887.

c. 104, 24 Stat. 379, as amended by Act of June 29, 1906, c. 3591, 34 Stat. 584, by Act of June 18, 1910, c. 309, 36 Stat. 545, by Act of Feb. 28, 1920, c. 91, 41 Stat. 474, and by Act of June 19, 1934, c. 652, 48 Stat. 1102; 49 U.S.C. § 1 (3).

Interstate Commerce Act, Sec. 6 (7):

"No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.". Act of June 29, 1906, c. 3591, 34 Stat. 587, as amended by Act of Feb. 28, 1920, c. 91, 41 Stat. 483; 49 U.S.C., Sec. 6(7).

Interstate Commerce Act, Sec. 15(13) as it read prior to amendment on Sept. 18, 1940:

"If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section." Act of June 29, 1906, c. 3591, 34 Stat. 590, as amended by Act of June 18, 1910, c. 309, 36 Stat. 553, and by Act of Feb. 28, 1920, c. 91, 41 Stat. 488; 49 U.S.C., Sec. 15(13).

Interstate Commerce Act, Sec. 15(13) as amended on Sept 18, 1940:

"If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be *published in tariffs or schedules filed in the manner provided in this chapter and shall be* no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for

the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section." Act of June 29, 1906, c. 3591, 34 Stat. 590, as amended by Act of June 18, 1910, c. 309, 36 Stat. 553, by Act of Feb. 28, 1920, c. 91, 41 Stat. 488, and by Act of Sept. 18, 1940, c. 722, 54 Stat. 912; 49 U.S.C., Sec. 15(13). (Italicized words added by amendment of Sept. 18, 1940.)